THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF SEATTLE, Defendant.	Case No. 2:12-cv-01282-JLR THE COMMUNITY POLICE COMMISSION'S RESPONSE TO THE CITY OF SEATTLE'S STIPULATED MOTION TO APPROVE PROPOSED ACCOUNTABILITY METHODOLOGY

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I. INTRODUCTION AND BACKGROUND

The CPC respectfully requests that the Court deny the City of Seattle's motion to approve its proposed accountability methodology. In December 2018, the Court issued an order to show cause "whether . . . [the City] has failed to maintain full and effective compliance with the Consent Decree." Dkt. # 504 at 1. Giving rise to that order were the Court's concerns that the City had agreed to provisions in its new collective bargaining agreement ("CBA") with the Seattle Police Officers Guild ("SPOG") that compromised critical elements of the City's 2017 Accountability Ordinance and related accountability systems policies and practices. The new CBA undermined reforms that had been carefully designed, after years of recommendations from independent oversight officials, the community, and policymakers, to establish a system that was both fair to police officers and deterred unconstitutional and ineffective policing—reforms the public had been told were gained by the Consent Decree and enactment of the Accountability Ordinance. Because these reforms now would not be fully realized, the continued constraints on the Chief of Police to address misconduct would erode public trust and confidence and impede sustained reform yet again.

In their briefs responding to Court's order to show cause, the City and the Department of Justice ("DOJ") downplayed the rollbacks and new impediments embedded in the new SPOG CBA, insisting they were of limited consequence. By contrast, the Community Police Commission ("CPC") explained in detail how the CBA (and the companion Seattle Police Management Association CBA) materially weakened a wide range of key reforms and called into question the City's "full and effective compliance" with the Consent Decree.

On May 21, 2019, the Court published its order finding the City out of compliance with the Consent Decree regarding accountability. Dkt. # 562. Agreeing with the CPC, the Court explained that its conclusion was "due to the changes in the Accountability Ordinance that occurred following implementation of SPOG's CBA and the City's reversion to an arbitration system . . . from the old, inadequate accountability regime." *Id*. at 14. The Court ordered the

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City and DOJ, in collaboration with the Monitor and the CPC, to report back to the Court by July 15 with a plan to remedy those deficiencies and show the Court how the City would come back into compliance. *Id.*

By mid-June the City still had not begun substantive collaboration or discussions with the CPC on how to respond to the Court's order, prompting a letter from 27 community organizations to the Mayor urging the City's "prompt action and professional cooperation with the CPC to regain the City's compliance with the Consent Decree." Declaration of David A. Perez ("Perez Decl."), Ex. A (1st Letter from Community Organizations, 6/21/2019). In response, the Mayor's Office issued a statement publicly contradicting the Court by asserting that "the City remains in full and effective compliance in every one of the areas required by the Consent Decree and set forth by the sustainment order."[1]

In the period following the Court's May 21 order, rather than consulting with the CPC and Monitor on how best to cure the identified barriers to sustained reform as the Court directed, the City "quietly assembled an outside panel of former law-enforcement officials and a current police-union lawyer to help the city respond to . . . [the] order."[2] The City did not consult with the CPC before hiring these out-of-state consultants.[3] In contrast with the existing expertise on the Monitor's team and the CPC, none of these consultants has prior involvement with Seattle's Consent Decree and related accountability reform; but their apparent mandate would be to

[1] Hana Kim, *Dozens of community organizations pressuring city on police accountability measures*, Q13Fox.com (June 21, 2019), *available at* https://q13fox.com/2019/06/21/dozens-of-community-organizations-pressuring-city-on-police-accountability-measures/ (last accessed: Aug. 14, 2019).

[2] Steve Miletich, *Seattle's use of outside advisory panel condemned by police-reform advocates*, Seattle Times (June 26, 2019), *available at* https://www.seattletimes.com/seattle-news/seattles-use-of-outside-advisory-panel-condemned-by-police-reform-advocates/ (last accessed: Aug. 14, 2019).

[3] *See Seattle CPC Co-chairs' statement on City's request for an extension in Consent Decree case*, Community Police Commission, Press Release (July 10, 2019), *available at* https://www.seattle.gov/Documents/Departments/CommunityPoliceCommission/Press%20Release%20July%2010.pdf (last accessed: Aug. 18, 2019).

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conduct an undefined analysis, with an open-ended schedule, of what *other cities do*—and without any commitment to remedy the identified deficiencies *in Seattle*.

By July 10, only five days before the Court's original deadline, the City still had not convened a work session. Instead, the City requested an additional month to respond to the Court's order. Dkt. # 566. In the weeks that followed, the City's consultants made several presentations to community members, including the CPC, and the City held one work session with all the key stakeholders, which included the CPC, the director of the Office of Police Accountability ("OPA"), the Inspector General, the police department, and the Monitor, among others. The CPC's feedback was clear and consistent: a city-by-city comparison would be unnecessary and unproductive.

It appears the City had already decided on its approach because on July 29, 2019, the City circulated a draft of its proposed methodology. Despite the feedback from the CPC and other community stakeholders, the City's proposal focused on a nationwide survey comparing Seattle's accountability system to that of various other cities, and yet another review of the entirety of Seattle's accountability system. Perez Decl., Ex. B (21CP Solutions' Draft Proposed Methodology). The City asked for comments by August 7—a week before the new deadline for submission to the Court. The draft proposal sidestepped the key issue animating both the Court's Order to Show Cause, and its order finding the City out of compliance: how the police contract rolled back reforms secured in the Accountability Ordinance and how and by when the City will remedy the continued, embedded barriers to a transparent, fair, timely, effective, and procedurally just disciplinary system. In fact, this draft proposal did not even *mention* the Accountability Ordinance. Simply put, the City's July 29 proposal was not responsive to the Court's order.

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The CPC provided its feedback on the City's draft proposal on August 7, 2019. Perez Decl., Ex. C (Aug. 7, 2019, CPC Letter and Analysis to 21CP Solutions) ("CPC Letter").[4] After explaining how the City's proposal failed to respond to the Court's order, the CPC's letter provided detailed suggestions for how the City could adjust its methodology to respond to the letter and spirit of the Court's order and remarks from the bench and move quickly to put the City back on the path to compliance. The CPC asked the City on several occasions whether it intended to adjust its proposal in light of the feedback from the CPC, community advocates, and other oversight officials. The City initially would not commit to revising its proposal. Perez Decl., Ex. D (8/9/2019 Perez e-mail to Cowart) and ¶ 6 (8/10/2019 Perez telephone call with Chen). Finally, late on August 13, 2019, the City notified stakeholders that it would circulate a revised methodology. *Id*., Ex. E (8/13/2019 Blair e-mail).

On August 14—the day before the Court's deadline—the City circulated its "final methodology to assess the accountability system developed by [the City's consultants]," making clear the City would submit it to the Court the next day. *Id*., Ex. F (8/14/2019 Cowart e-mail and attachment) ("City's Proposed Methodology"). The last-minute revisions modestly improved upon the draft proposal by touching upon some of the major rollbacks to the Accountability Ordinance contained in the CBAs. But ultimately, the concerns articulated in the CPC Letter remain. As with its initial draft, the City's "final methodology" is not responsive to the Court's order and instead reflects a missed opportunity to take meaningful action. In fact, as outlined below, the City's methodology implicitly questions and undermines the reasoning and conclusions in the Court's May 21 order finding the City out of compliance.

Notably, on August 16, 2019, the day after the City filed its methodology with the Court, the King County Superior Court vacated the arbitrator's decision to reinstate Officer Shepherd,

[4] *See also* Steve Miletich, *Citizen panel unanimously rejects Mayor Durkan's proposal to address Seattle police accountability flaws*, Seattle Times (Aug. 8, 2019), *available at* https://www.seattletimes.com/seattle-news/citizen-panel-spurns-durkans-proposal-to-address-seattle-police-accountability-flaws/ (last accessed: Aug. 14, 2019).

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concluding that the decision to reinstate the officer "violates the explicit, dominant and well-defined public policy against the use of excessive force in policing."[5] That the City had to resort to such extraordinary measures to vacate this ruling—and that a King County judge has concluded that the ruling contravened "public policy against the use of excessive force"—underscores the importance of fixing the attributes of the accountability system that led to the ruling in the first place. Underscoring what is at stake, SPOG's statement called the King County judge's decision "an affront to Binding Arbitration."[6] The reversal shows why this Court and the CPC were correct to home in on the Adley Shepherd case as emblematic for how the City was no longer in compliance with the Consent Decree.

II. THE CITY'S PROPOSAL IS NOT A METHODOLOGY TO ACHIEVE COMPLIANCE.

A. The first part of the City's proposal is redundant with past efforts and lacks the commitment necessary for the City to achieve real reform.

In Part I of the City's proposal, the consultants offer to "[c]onduct an evaluation of the current accountability system, with a specific focus on attributes that contributed to the outcome in the Adley Shepherd case." City's Proposed Methodology.

First, this is unnecessary. The Court already reviewed these issues, and the parties and CPC have thoroughly briefed them. That was one of the main considerations prompting the December 2018 order to show cause: the "decision to reinstate an officer who had violated three provisions of . . . SPD's use-of-force policies when he punched a handcuffed subject in the face while she was sitting in a patrol car, and the new CBA's rejection of reforms in the Accountability Ordinance that would have substantially changed the process and standard of

[5] Lewis Kamb, *Judge reverses arbitrator's rule reinstating Seattle police officer who punched handcuffed suspect*, Seattle Times (Aug. 17, 2019), *available at* https://www.seattletimes.com/seattle-news/judge-reverses-arbitrators-rule-reinstating-seattle-police-officer-who-punched-handcuffed-suspect/ (last accessed: Aug. 18. 2019).

[6] SPOG, *Statement regarding Officer Adley Shepherd decision* (Aug. 16, 2019), *available at* https://seattlepoliceofficers.org/statement-regarding-officer-adley-shepherd-decision/ (last accessed: Aug. 18, 2019).

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review by which the decision was made" caused the Court "to question whether the City and . . . SPD can remain in full and effective compliance with the Consent Decree." Dkt. # 504 at 8.

Second, the City states that this "assessment *will address* specific areas where the current CBA deviates from the provisions of the accountability legislation." City's Proposed Methodology at 2 (emphasis added). But "will address" lacks any commitment to *cure, remedy, implement,* or *achieve*. Underscoring the City's apparent intention to conduct an academic exercise rather than actual reform, the City proposes to "map all elements of the discipline grievance and arbitration processes to applicable laws, rules, policies and collective bargaining agreements." *Id.* at 2-3, ¶ 1. From there, the City plans to conduct a redundant re-dissection of "the systemic attributes of the discipline appeals process that contributed to the outcome of the [Shepherd] case." *Id.* at 3, ¶ 2. Busywork is not a methodology to achieve compliance with the Consent Decree.

Third, the proposed methodology is devoid of any detail the concerning the "specific areas where the current CBA deviates from the provisions of the accountability legislation" that we already know about, including: (i) the calculation of the 180-day timeline, (ii) the quantum of proof and standard of review in disciplinary appeals, and (iii) the lack of full subpoena authority for OPA and OIG. There is no need to reinvent this wheel: the CPC already analyzed each deviation in detail in its brief to the Court responding to the order to show cause, *see* Dkt. # 533, and even before that the CPC reviewed this analysis with the City when the proposed CBAs were first publicly shared in 2018. The Court did not order the City to conduct a redundant assessment; the Court ordered the City to provide a viable plan on how and when to remedy these previously-identified deficiencies.

Fourth, setting aside the redundancy, the proposed assessment leaves out many other aspects of the disciplinary appeals processes that have been identified as hindering fairness, timeliness, transparency, and uniformity. These include, at a minimum, long overdue reforms to the secondary employment system; the overly broad CBA preemption language that can

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effectively vitiate any City ordinance provision with language inconsistent with any CBA language; the constraints on civilian oversight of misconduct investigations involving criminal misconduct; the statute of limitations language that forecloses discipline for excessive force, dishonesty, and misconduct concealed by others; the differential treatment of different ranks; and other well-detailed barriers to accountability. *See* CPC Letter, Analysis at 4-8. None of these other issues are even mentioned in the City's proposed methodology.

And ***fifth***, rather than focus its efforts on addressing the specific issues already identified as problematic barriers to reform, the City appears intent on conducting yet another review of the totality of the accountability system (although it does not make clear the scope of that analysis). In other words, as the CPC stated in its letter, the City has chosen "to respond to the Court's order [by] conduct[ing] yet another assessment of the entire accountability system and structure that will not even be at baseline until the significant contractual impediments are remedied." *See* CPC Letter, Analysis at 3.

In sum, while Part I represents an improvement from the City's initial draft methodology, it still falls well short of what the Court ordered on May 21.

B. A nationwide survey is unnecessary and counterproductive. Equivalency to other cities is not a metric to determine compliance with the Consent Decree.

Despite strong feedback against this idea from the CPC and others, the second part of the City's methodology mirrors the City's first draft from July 29: a survey comparing Seattle's accountability system to various other jurisdictions. City's Proposed Methodology at 3-5. The CPC Letter discusses why this "survey" approach would be a waste of precious time and resources.

First, a nationwide survey is not a methodology to achieve compliance with the Consent Decree. Instead, it is a largely academic exercise that would compare Seattle to various other municipalities. After this nationwide survey, the City hopes to have a better idea of how to craft

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and then implement an accountability ordinance. Left unsaid is that Seattle already has an Accountability Ordinance:

> Through a years-long process, Seattle stakeholders identified, advocated for, and then secured in the accountability law many essential elements to a fair and legitimate system. Other cities may have some or none of those essential elements, but equivalency to other cities is not the metric to which the Court or community aspire. Indeed, one of the observations which drove the CPC's recommendations on accountability reform in 2014 was that no jurisdiction nationally had arrived at a set of best practices that deliver public legitimacy and satisfaction on accountability. Seattle needed to do better. If the measure of whether reforms should be adopted is whether other cities use those approaches, Consent Decree reforms would have been few and far between.

CPC Letter, Analysis at 2-3.

Second, what other cities are doing is not relevant to what Seattle must do to comply with this Consent Decree. Relying on a survey to decide which reforms to implement suggests that if other cities haven't adopted certain reforms, then it is fine for Seattle not to adopt them, either. Whether other cities make robust use of subpoena power for their administrative investigations, for instance, is not the point. Seattle should not aspire to the lowest common denominator. The City's approach assumes other cities have achieved or surpassed a threshold level of efficacy and community satisfaction with their approaches to police accountability.

> Other cities may have some or none of those essential elements, but equivalency to other cities is not the metric to which the Court or community aspire. Indeed, one of the observations which drove the CPC's recommendations on accountability reform in 2014 was that no jurisdiction nationally had arrived at a set of best practices that deliver public legitimacy and satisfaction on accountability. Seattle needed to do better. If the measure of whether reforms should be adopted is whether other cities use those approaches, Consent Decree reforms would have been few and far between. When Seattle's Use of Force policy was adopted, for example, to our knowledge, no other city required de-escalation as part of their internal policy on use of force. As well, other cities are not similarly situated (they are not under a Consent Decree, and may have numerous other differences that require a nuanced understanding to compare outcomes).

Perez Decl., Ex. C, CPC Letter, Analysis at 2-3.

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Third, the starting point is not what *other cities are doing*, but instead should be the Accountability Ordinance.[7] As the Court observed in its May 21, 2019 Order, "the original, unmodified Accountability Ordinance was the only accountability benchmark by which the court could assess the City's Phase I compliance in that area at that time." Dkt. # 562 at 5. A unanimous City Council passed the Accountability Ordinance over two years ago. The Court held back its approval of the ordinance given the City's negotiations with SPOG over a new CBA. *See* Order Regarding Accountability Ordinance (Dkt. # 413) at 2 (refusing to approve Accountability Ordinance prior to collective bargaining because "no provision of the Ordinance is categorically exempt from bargaining . . . [and because] the relevant unions may disagree with the City's assessment concerning which provisions of the Ordinance are subject to collective bargaining").[8] The CPC is hardly alone in expressing its grave misgivings about this approach. On the same day that the City released its final proposed methodology, a coalition of more than 30 community organizations sent the City a letter criticizing the City's approach:

> We urge you to reconsider. It would be a mistake and waste of City and community time to cast aside the work done by local legal,

[7] The CPC agrees that accountability systems can and should be improved continuously as best practices change and community experiences with law enforcement highlight new needs. Indeed, that is a defined role for the accountability system oversight bodies. In the months and years ahead, these oversight bodies will recommend additional improvements along the way. But at this moment comparisons to other cities are irrelevant to compliance.

[8] In its brief, the City observes that it cannot unilaterally change the CBA, and that it must collectively bargain in good faith. But no one disputes that.

The City cites the first sentence of the Accountability Ordinance to support this notion, but fails to mention that this same provision provides that "the City shall take *whatever steps are necessary* to fulfill all legal prerequisites within 30 days of Mayoral signature of this ordinance . . . including negotiating with its police unions to update all affected collective bargaining agreements so that the agreements each conform to and are fully consistent with the provisions and obligations of this ordinance, in a manner that allows for the earliest possible implementation to fulfill the purposes of this Chapter 3.29." SMC 3.29.510(A).

The City also disagrees with utilizing reopeners. According to the City, "[f]rom start to finish, the process of initiating bargaining on a reopener and proceeding to a final decision by an arbitrator would take at least nine to twelve months." Dkt. # 576 at 28. Had the City exercised this option last year, the process would be almost complete by today. The City also neglects to acknowledge that for at least two key reform areas—subpoena power and secondary employment—the City agreed to the strategy of reopeners in lieu of following through on its promise to secure promised reforms in the CBAs. Approaching a year since the SPOG CBA was ratified, the City has unfortunately failed to take any steps to exercise the reopeners.

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> policing, directly impacted, and community experts to guide the drafting and passage of the Ordinance, and the CPC's analysis of the CBA's impact on the Ordinance and its intended outcomes. . . .
>
> Now is the time for the City of Seattle, together with the CPC and Monitor, to move forward with a substantive plan "for how the City proposes to achieve compliance." Every delay in resolving the accountability and compliance issues further erodes community trust in our police. Our highest aim is for community trust in policing to be strong and secure. Community trust in policing improves public safety. Hiring new consultants and diverting attention away from the Court's directive serves to undermine, rather than build, community trust.

Perez Decl., Ex. G (8/14/2019 Second Community Letter). In effect, by proposing that the City needs to see which reforms other cities have adopted in order to decide what the Seattle will do next, the City is telegraphing that the reforms to which elected officials committed as far back as 2014, and for which the City was supposed to bargain vigorously, are reforms the City still is not sure it intends to implement. This equivocation and failure to follow through raises serious doubts about how committed the City will be to reform should the Consent Decree end.

The City's attempt to hide behind an unfair labor practice claim is a strawman. The City passed a law requiring it to implement these reforms as quickly as possible. SMC 3.29.510(A). Expressly stating that the City will no longer tolerate practices that have been identified as contrary to a fair and effective accountability system is not in conflict with good faith bargaining. The City can bargain in good faith *and also* guarantee constitutional policing, and *insist* on provisions in the CBA that are necessary for constitutional policing.

Fourth, a nationwide survey does not offer a path toward timely compliance; instead, it is a recipe for many months (and possibly several years) of additional delays and distractions. In effect, the City proposes to ***re-start*** the process of time-consuming and years-long efforts of citywide community and legislative deliberation that led to the Accountability Ordinance in the first place. We don't have time to hit the reset button. The delays inherent in the City's approach almost certainly will ensure that the very contract terms the Court has found to be inconsistent with the Consent Decree remain in full force and effect for several more years.

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Restarting the process will require significant, ongoing expenditure of resources from the Court, the Monitor, SPD, the CPC, and other newly established or strengthened oversight entities, when there are other subjects—such as work addressing police officer wellness[9]—that require focused attention. Because its effect would be to delay any real reform, the City's methodology is the opposite of presenting the Court with a specific plan and timeline "for how the City proposes to achieve compliance." Dkt. # 562 at 14.

Taken together, the CPC does not believe the City's proposal is responsive to the Court's May 21, 2019 Order. After more than five years of discussions, public hearings, community input, and court filings, there is still no indication in this proposed approach that the City is committed unequivocally to embracing the long-promised accountability reforms. The CPC respectfully requests that the Court deny the City's stipulated motion, and instead order the City to adopt a methodology substantially similar to the feedback the CPC presented in its August 7, 2019, letter.[10]

III. CONCLUSION

The City has not identified a single key stakeholder that agrees with its final methodology—save for the DOJ, which has taken the clear position that this entire matter falls outside the Consent Decree.

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[9] CPC, *CPC votes to form Police Wellness Workgroup, SPD and others say they'd like to partner in the work* (July 18, 2019), *available at* http://perspectives.seattle.gov/cpc-votes-to-form-police-wellness-workgroup-spd-and-others-say-theyd-like-to-partner-in-the-work/ (last accessed: Aug. 18, 2019).

[10] The Monitor has made several specific and very insightful suggestions that the CPC finds to be much more productive and practical than the City's proposal. For instance, the Monitor has proposed (i) requiring the City to canvas the CPC prior to collective bargaining for substantive feedback on priorities, (ii) restoring subpoena power immediately to the OPA and Inspector General, (iii) pegging the burden of proof for disciplinary actions at preponderance, and (iv) making accountability standards uniform across all ranks of superiority. The Monitor's suggestions, combined with the CPC Letter, are indicative of the type of feedback we understand has been shared with the City by other participants. The CPC is still evaluating many of the Monitor's ideas, and likely will have specific feedback on each should they move forward; but suffice to say that the Monitor's suggestions are concrete, practical, and much more responsive to the Court's order and seem to reflect similar concerns with the City's open-ended proposal to reassess the entire accountability system and conduct a nationwide survey.

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Not so long ago, in the wake on another case of officer misconduct—one where the City *paid* $100,000 to an officer who arbitrarily arrested an elderly black man who was using a golf club as a cane—Seattle City Attorney Peter Holmes reflected on the importance of removing the impediments embedded in each of the CBAs negotiated with the police unions:

> The City must regain its ability to manage, discipline, and hold officers accountable without the impediments that have been inserted into collective-bargaining agreements over the years. . . . This case demonstrates the vital importance of obtaining new agreements with our police unions that fully embrace reforms achieved through the Consent Decree.[11]

That was nearly two years ago, months after the City Council unanimously passed the Accountability Ordinance, and over a year before the City would bargain away that same ordinance in its new police contract. But the City Attorney's observation was correct then, and it remains correct today: it is *vitally important* for the City to *remove impediments* to officer accountability that have been embedded in CBAs over the years, and "*fully embrace reforms achieved through the Consent Decree*," such as the Accountability Ordinance.

Because the City's proposed methodology is not a plan to fully embrace reforms achieved through the Consent Decree, or to achieve compliance with that Consent Decree, the CPC respectfully requests that the Court deny the City's stipulated motion, and instead order the City to propose a revised methodology substantially similar to the feedback detailed in the CPC's August 7, 2019 letter.

[11] Editorial, *Whitlatch Settlement Underscores Need for a New, Better, Police Union Contract*, SEATTLE WEEKLY (Sept. 6, 2017), *available at* https://www.seattleweekly.com/news/whitlatch-settlement-underscores-need-for-a-new-better-police-union-contract/ (last accessed: Aug. 12, 2019).

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DATED: August 19, 2019

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on August 19, 2019, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

DATED this 19th day of August, 2019.

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